

ARMY CORPS OF ENGINEERS
STANDARD OPERATING
PROCEDURES
FOR THE REGULATORY PROGRAM

Standard Operating Procedures

Introduction.

These Standard Operating Procedures (SOP) are comprised of three parts. The first part, "Policies and Procedures for Processing Department of the Army Permit Applications," highlights critical portions of the U.S. Army Corps of Engineers implementing regulations to be used in reviewing permit applications. The second part, "Regulatory Program Priorities," provides "above the line" and "below the line" guidance for districts to prioritize their Regulatory Program administration efforts. The third part, "Revised Quarterly Permit Data System (QPDS) Definitions," provides clarification of definitions for inputting information into QPDS. The SOP has three purposes. First, by highlighting important existing procedures and policy, the SOP serves to facilitate consistent program implementation. Second, prioritizing Regulatory Program efforts helps to facilitate efficient national program direction to best achieve the three goals of the Regulatory Program: (1) Protect the environment; (2) Make reasonable decisions; and, (3) Enhance Regulatory Program efficiency. Third, clarification of the QPDS definitions is intended to unequivocally narrow the current gaps in their interpretation to provide an accurate data base that is essential to the analysis of workload, performance, and therefore, resource needs. When applied in conjunction with effective communication on budget needs and good workload indicators, the SOP serves to assure the most equitable distribution of funds proportionate to the district's respective workloads. The Corps must strive to implement its Regulatory Program as consistently as possible across the country in fairness to the regulated public and individual districts in protection of the aquatic environment.

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PART I

Policies and Procedures for Processing Department of the Army Permit Applications

Part I highlights existing policies and procedures to be used in reviewing applications for Department of the Army (DA) permits under Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act (RHA) of 1899, and Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972. It is not intended to be comprehensive or to replace the implementing regulations for the U.S. Army Corps of Engineers Regulatory Program (33 CFR 320-330) or other official policy guidance contained in Memoranda of Agreement (MOA), Regulatory Guidance Letters (RGLs), etc. Part I simply highlights critical policies and procedures that are major factors in administering a consistent program nationwide. These critical policies and procedures, however, are those that the Major Subordinate Commands and CECW-OR will evaluate in our future consistency reviews. In addition, consistency with Part I will be a factor in responding to districts' requests for additional resources.

1. Scope of Analysis.

- *Corps determines scope*
- *33 CFR 325 Appendix B,C*

Scope of analysis has two distinct elements, determining the Corps Federal action area and how the Corps will evaluate indirect, or secondary, adverse environmental effects. The Corps determines its action area under 33 CFR 325 Appendix B and C. Generally, the action area includes all waters of the United States, as well as any additional area of non-waters where the Corps determines there is adequate Federal control and responsibility to include it in the action area. The action area always includes upland areas in the immediate vicinity of the waters of the United States where the regulated activity occurs. For example, the action areas for a road access to uplands for a residential development is the road crossing of waters of the United States and the upland area in the immediate vicinity of the road crossing. In a similar case where there is not only the road crossing, but also considerable additional impacts to waters within the residential development (interior road crossings, house fills, stormwater control berms/dams, etc.), then the Corps action area is the whole residential development. The Corps analyzes all adverse environmental effects within the action area. In addition, the Corps is responsible for analyzing the direct and indirect impacts of its permit decisions, within the action area once the scope of analysis (which defines the corresponding action area) is properly determined. Direct impacts are those that happen in direct response to the permitted activity (e.g., the direct impact of dam construction is the loss of habitat in the dam footprint). Indirect impacts, on the other hand, are those removed in time and/or distance in relation to the permitted activity (e.g., the indirect impact of dam construction is the inundation of the area behind the dam). Another example would be habitat and/or fisheries impacts downstream of the dam associated with hydroperiod changes. Both direct and indirect impacts of the permitted activity (e.g., road crossing to access uplands or the entire residential community in the examples above) must be evaluated within site-specific and cumulative impact contexts. It is appropriate for the Corps to evaluate these impacts and render final permit and mitigation decisions based on its evaluation. It is not appropriate, however, for the Corps to consider indirect impacts that are beyond the action area in its regulatory decisionmaking, where those impacts would have occurred regardless of the Corps decision on

the permit (e.g., habitat fragmentation, increases in traffic and noise could be judged as these types of impacts).

2. Jurisdiction.

- *33 CFR Parts 323, 328, and 329*
- *Corps determines exemptions (if no special case)*
- *Exemptions do not allow waters conversions*

Not every area that looks like a wetland or other waters of the United States is jurisdictional, and not all activities in jurisdictional waters are subject to regulation. Guidance on jurisdiction is found in the preamble to the 1986 consolidated regulation, 33 CFR Part 328 and in Parts 323.3, 328.3, and 329.

Part 329 only addresses Section 10 navigable waters. These regulations provide guidance on jurisdictional determinations, as well as, on areas that are not regulated and on activities that are exempt from regulation. The preamble to 33 CFR Part 328 states that features excavated from uplands are not considered waters of the United States. For example, a drainage ditch excavated in the uplands, and/or located along a roadway, runway, or railroad that only carries water from upland areas, is not considered jurisdictional, even if it supports hydrophytic vegetation. Other common examples of non-jurisdictional areas excavated from uplands include stormwater or other treatment ponds, detention basins, retention ponds, sediment basins, artificial reflecting pools, and golf course ponds. Gravel pits excavated from uplands are not considered jurisdictional, so long as the areas in question have not been abandoned (i.e., the area is under some sort of management plan related to the gravel operation, including use as a water supply or water storage area). Wetlands that form on top of a landfill are not subject to Corps jurisdiction.

Some activities taking place in jurisdictional waters of the United States are exempt from regulation. The regulation concerning exempt activities is found in 33 CFR 323.4. Many of the exempt activities listed in this section are related to agriculture, forestry, or mining. For example, the list includes normal farming, silviculture, and ranching activities including plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products. As long as these activities are part of an established farming, silviculture, or ranching operation they are exempt from regulation under Section 404 of the CWA. It is the responsibility of the Corps to determine if the activities are part of an ongoing operation, and therefore, are exempt (unless the Environmental Protection Agency (EPA) declares a special case under the 1989 MOA on jurisdiction in advance of the Corps determination). Another common example of an exempt activity would be the discharge of sediment, removed from a roadside ditch, into waters of the United States when that ditch was constructed through waters of the United States, prior to the enactment of Corps regulation. The ditch and adjacent waters would be considered a jurisdictional area, however, the discharge of sediments removed from the ditch needed to restore the contours to original design is exempt from regulation under Section 404 (33 CFR 323.4 (a)(3)). None of the exemptions listed in 33 CFR 323.4 allow for the conversion of waters of the United States to dry land (beyond any conversion that was authorized by the original project that is being maintained) through filling or drainage activities. Plowing a wetland and maintenance of existing drainage (ditches, drain tiles, etc.) may be exempt from regulation, but discharges associated with the installation of a new drainage system to convert additional wetlands to uplands require a Section 404 permit. By regulation at 33 CFR 323.2(d), issued on May 10, 1999, resulting from litigation on the Excavation Rule, activities where

incidental fallback of excavated materials is the only discharge are not regulated as a discharge of dredged material, pursuant to Section 404 of the CWA. Additional guidance is provided by a joint Corps/EPA memorandum dated 11 April 1997. However, activities that involve the discharge of the excavated material are regulated discharges where the material is sidecast, or otherwise discharged into waters of the United States. Examples include mechanized landclearing, and excavating a new drainage ditch where the material is sidecast into wetlands. Of course, navigational dredging in Section 10 waters, or any other excavation in Section 10 waters, continues to be regulated, pursuant to Section 10 of the RHA. The Corps regulates the discharge of dredged material into waters of the United States, pursuant to Section 404 and the transportation of dredged material for ocean dumping, pursuant to Section 103 of the Marine Protection, Research, and Sanctuaries Act.

The term drainage ditch is defined as a linear excavation or depression constructed for the purpose of conveying surface runoff or groundwater from one area to another. The term drainage ditch does not include drainage systems which also serve to hold and manage water flow (flood control systems). If a drainage ditch is constructed entirely in uplands, it is not a water of the United States unless it becomes tidal or otherwise extends the ordinary high water mark of existing Section 10 navigable waters. However, if a ditch is excavated in waters of the United States, including wetlands, it remains a waters of the United States, even if it is highly manipulated (RGL 87-7, dated 17 August 1987).

3. Wetland Delineations.

- ***Prioritize “mom and pop” JDs***
- ***Advise the public via PN***

Field wetland delineations are essential to timely and accurate processing and evaluation of permit applications in these areas. However, field delineations are time and resource intensive and, in some districts, require an inordinate amount of time that the district could be devoting to other aspects of the process. In addition, Corps workload is generally comprised of "mom and pop" applications, as well as those from applicants who could hire consultants to perform the field wetland delineation for the district to verify. For these reasons, districts should advise (e.g., via public notice (PN)) their respective constituencies that they will prioritize their delineation efforts as follows: (1) Verification of delineations received with an application; (2) Preparation of field delineations for “mom and pop” operations (those applicants whom, in the districts’ judgement, cannot afford to hire a consultant) where there is an application; (3) Preparation of field delineations for larger operations where there is an application; (4) Verification of delineations where there is no application; (5) Preparation of field delineations where there is no application.

4. Forms of Permits.

- ***Use GPs/LOPs whenever possible***
- ***GPs can address ESA/NHPA issues***
- ***Develop GPs for periodic emergencies***

Permits. The overall goal of the Regulatory Program is to provide for a timely permit decision that protects the aquatic environment and is fair, reasonable, and flexible for the applicant. The Corps should evaluate projects using the least extensive and time consuming review process, while still providing protection for the aquatic environment.

For projects that involve minimal net adverse effects on the aquatic environment, after consideration of compensatory mitigation, general permits (GP) or letters of permissions (LOPs) should be used rather than a standard permit (SP) review. GPs include nationwide permits (NWP) and regional general permits (GPS). The use of GPs are encouraged, because GPs can be conditioned sufficiently to provide the same environmental protection as an SP (including conditions addressing endangered species and compensatory mitigation concerns), and are just as enforceable as an SP. Therefore, the district should not hesitate authorizing a project with GPs for fear that it will be unenforceable.

Projects which may cause more than minimal adverse effects to the aquatic environment, should receive an SP review. LOPs, that are subject to Section 10 of the RHA, should be used on a case-by-case basis to authorize activities where the work will have only minor individual or cumulative impacts on the environment or navigation, and where the work would encounter no appreciable opposition. LOPs in cases subject to Section 404 CWA (as well as Section 10 RHA), may be used to authorize projects that exceed the aforementioned thresholds, provided a PN has been issued establishing the suite of activities and geographic area where the LOP will be in effect. This process is essentially the same as establishing an RGP. Normally, coordination with applicable Federal and State agencies project by project is included in an LOP and adjacent property owners are notified. The short agency notification period, lack of need for a PN and the additional activity conditions associated with an LOP result in abbreviated documentation needed to authorize a project under an established LOP, which saves time over the preparation of an SP decision document.

Emergency Procedures. Division engineers are authorized to approve special procedures in emergency situations. Each division should develop emergency permit authorization procedures as well as essential points of contact. An "emergency" is defined in the regulations (33 CFR 325.2(e)(4)) as a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate unforeseen, and significant economic hardship if corrective action, requiring a permit, is not undertaken within a time period less than the normal time to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. This entire process may be verbal in extreme emergencies. Even in emergency situations, districts should make a reasonable effort to obtain comments from the involved Federal, State, local agencies, and the public. In addition, districts should publish a notice regarding the special procedures authorized and their rationale as soon as practicable after the emergency permit is issued. Districts should also maximize the use of exemptions, as well as available regional, programmatic, and nationwide GPs in emergency situations. Some districts have developed GPs for emergency situations, which the district believes will periodically reoccur. This provides a more efficient, predictable permit mechanism to deal with the emergency when it reoccurs without reinventing the wheel, as well as an opportunity to efficiently coordinate with the involved agencies and the public. In any event, districts and divisions should establish procedures for the coordination of emergency permits whether or not GPs have been developed.

5. Discretionary Authority.

- ***Do not use discretionary authority just because project controversial***

Discretionary authority is a tool (33 CFR 330.8) used to assert a more rigorous review of projects eligible for a GP (NWP or RGP) due to perceived adverse impacts to the aquatic environment. Generally speaking, evaluators should carefully consider the need for asserting discretionary authority over a project that would otherwise qualify for a GP. It is inappropriate to assert discretionary authority over a project, merely because it is controversial. A RGP or NWP can be issued quickly and provide maximum environmental protection, through effective permit conditioning. It is also critical that when a NWP is moved into an SP review, the administrative record supports the Corps action, including all notification time constraints associated with the NWP program. If a project meets the requirements of a NWP or other GPs, the Corps should carefully examine the facts and options available, commence the processing of the application in the manner that is the most efficient and the one that provides adequate protection of the aquatic environment. Of course, the SP process is appropriate for proposed projects that do not meet applicable GPs criteria.

6. Pre-application Meetings.

- ***Corps arranges***
- ***Not for minor impact projects***
- ***Be candid with applicants***

Pre-application meetings, whether arranged by the Corps or requested by permit applicants, are encouraged to facilitate the review of potentially complex or controversial projects, or projects which could have significant impacts on the human environment (see 33 CFR Part 325.9(b)). Pre-application meetings can help streamline the permitting process by alerting the applicant to potentially time-consuming concerns that are likely to arise during the evaluation of their project. Examples include historic properties issues, endangered species impacts, dredging contaminated sediments, 404(b)(1) compliance statements, mitigation requirements, etc. For example, if the district knows there are endangered species in the vicinity of the project site, the applicant can be made aware of the procedural requirements and potential delays associated with resolving those issues. Likewise, if the district has a reason to believe that a proposed dredging site is contaminated, the applicant can be made aware of testing requirements and costs, potential environmental and/or human health impacts from the contaminants, dredged material disposal/management options, as well as the associated time delays. Pre-application meetings are not recommended for projects that will result in only minor adverse impacts to the aquatic environment. Each Corps district is responsible for determining if a pre-application meeting is necessary (not the applicant or another agency) and if so, who will host/facilitate the meeting. Applicants usually appreciate a candid dialogue on their project, even if the discussion means substantial modification of the project may be necessary. It is vital to the success of the pre-application meeting to have knowledge of the project, prior to the meeting date and to be prepared to discuss ways to avoid/minimize project impacts. It should be remembered that the issuance of a PN should not be delayed to obtain information necessary to evaluate an application (33 CFR 325.1(d)(9)). An application is determined to be complete when sufficient information is received to issue a PN (33 CFR 325.1(d) and 325.3(a)). See 7. below.

7. Complete Application.

- *Refer to 33 CFR 325.1(d)*
- *15 days to request information*
- *15 days to publish a PN*

The information needed to deem a permit application complete is listed in 33 CFR 325.1(d). Upon initial receipt of an application, the Corps has 15 days to either request additional information (to render the application complete) or issue a public notice (33 CFR 325.2(a)(1) and (2)). The Corps will contact the applicant within 15 days if additional information is necessary. The Corps should encourage applicants to provide a wetland delineation as part of their permit application. In some instances, submission of a wetland delineation is required for a permit application to be considered as complete (e.g., some NWP's). While additional information may eventually be needed to complete the evaluation of the project (e.g., an alternative analysis under the Guidelines), only that information identified at 325.1(d) is required to publish a PN. Once an application is deemed complete, the next step is to determine what form of permit review is appropriate for the proposed project and issue a PN (for SPs), within 15 days (33 CFR 325.2(a)(2)).

8. Project Purpose.

- *Basic project purpose used for water dependency*
- *Overall project purpose used for alternatives analysis*
- *Corps determines*

Defining the project purpose is critical to the evaluation of any project and in evaluating project compliance with the Section 404(b)(1) Guidelines (Guidelines). As stated in HQUSACE's guidance resulting from the Section 404(q) elevation of the Twisted Oaks Joint Venture and Old Cutler Bay permits, defining the purpose of a project involves two determinations, the basic project purpose, and the overall project purpose. The Twisted Oaks project proposed impounding a stream, by constructing a dam, to create a recreational amenity for a residential development proposed on adjacent uplands. HQUSACE agreed that, from a basic project purpose perspective, the dam was water dependent, but that the housing was not. Since the project included two elements, a project purpose excluding either was inappropriate. Therefore, it was concluded that the overall project purpose was a residential development with a water-related amenity. In Old Cutler Bay, the overall project purpose was properly determined to be "to construct a viable, upscale residential community with an associated regulation golf course in the south Dade County area." This overall project purpose recognizes that an essential part of the upscale residential project was to include a full size (regulation) golf course, and identified a reasonable geographic area for the alternatives analysis.

The basic purpose of the project must be known to determine if a given project is "water dependent." For example, the purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfill the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent. If a project is not water dependent, alternatives, which do not involve impacts to special aquatic sites are presumed to be available to the applicant (40 CFR 320.10(a)(3)). Examples of water dependent projects include, but are not limited to, dams, marinas, mooring facilities, and docks. The basic purpose of these projects is to provide access to the water. Although the basic purpose of a project may be water dependent, a vigorous evaluation of alternatives under National

Environmental Policy Act (NEPA) and the Guidelines will often be necessary due to expected impacts to the aquatic environment (e.g., a marina that involves substantial impacts to or the loss of marsh or seagrass bed).

The overall project purpose is more specific to the applicant's project than the basic project purpose. The overall project purpose is used for evaluating practicable alternatives under the Section 404(b)(1) Guidelines. The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives. Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the context of the desired geographic area of the development, and the type of project being proposed. Defining the overall purpose of a project is critical in its evaluation, and should be carefully considered. For example, a proposed road through wetlands or across a stream to provide access to an upland residential development would have an overall project purpose of "to construct road access to an upland development site." Based on this overall project purpose, the Corps would evaluate other potential access alternatives. However, the Corps would not consider alternatives in any way for the residential community or otherwise "regulate" the upland housing.

9. Preparing Public Notices.

- ***Refer to 33 CFR 325.3(a)***
- ***Include required information***
- ***No EAs or other extraneous info***

The information that must be referenced in a PN is defined in 33 CFR 325.3(a). The PN should contain a concise description of the project, the overall project purpose, and its anticipated impacts on the aquatic environment. It should contain the minimum number

of exhibits needed to adequately illustrate the plan, and should be as brief as possible to minimize printing and mailing costs. Applicants are not required to provide an alternatives analysis for PN purposes. If one is offered in the application, a brief summary of it may be included in the PN. Similarly, applicants are not required to submit a mitigation plan for PN purposes, but if one is provided in the application, a brief summary of it may be included in the PN. PNs will be printed on both sides of the paper.

The PN should also contain a preliminary assessment of project impacts on endangered species and historic properties. The omission of a statement addressing the need for an EIS in the PN is by default a district preliminary determination that an EIS is not required for project review. If a statement is made in the PN that a given project "may effect" a federally listed species, the District should immediately request formal consultation or pursue a not likely to adversely affect determination with the U.S. Fish and Wildlife Service (USFWS) and National Marine Fishery Service (NMFS) under the Endangered Species Act (ESA). All districts should establish local procedures with the appropriate service (USFWS or NMFS) office to coordinate, where appropriate, the preliminary review of proposed projects for the purposes of complying with the ESA.

Districts will not publish an EA, or other unnecessary materials, in a PN. Inclusion of an EA in a PN is not required by the regulations, and does not represent economic stewardship. Districts should not expend any significant effort toward the preparation of an EA until after the close of

the PN comment period, when sufficient information has been gathered to address the public interest factors.

The PN comment period should be no more than 30 days, nor less than 15 days. The nature of the project and the geographic distribution of the notice are factors that should be used in determining how long to advertise the PN. In many cases, a PN of 15 to 21 days is sufficient time to allow the public to comment. To expedite the permit process, districts are encouraged to issue PNs for shorter periods of time where appropriate (e.g., emergency situations).

If comments generated by the PN cause the applicant to modify the plans for the project, consider whether the probable impacts to the aquatic environment resulting from the changes are substantially different from those described in the original PN before republicizing the project. If project impacts are similar to, or less than the original submittal, the Corps will proceed with a decision, without issuing another PN. To reduce cost, save time, and prevent possible confusion, avoid issuing an additional PN unless necessary.

To improve efficiency and reduce costs, districts may post PNs on the District Regulatory Home Page. Districts should coordinate via PN, prior to removing anyone from established mailing lists.

10. Internal Coordination.

- ***Conduct routine, cost - effective coordination with other Corps elements***

PNs and pre-construction notifications (PCNs) should routinely be coordinated with other district elements (e.g., Operations, Engineering,

or Planning) to determine if the proposed action could affect a Federal project (e.g., Corps recreation areas, flood control, or navigation projects) located in the proximity of the proposal. Although the Corps office contacted may not have any concerns, it may be able to provide advice regarding other parties interested in the proposed work (e.g., marine trade groups, recreation associations). However, the Corps regulatory chief should also ensure that any added cost of this coordination is both legitimate and reasonable. Not all internal coordination should be funded from GRF funds. For example, other district elements should use project funds to determine if a proposed action (that is the subject of a permit application) could affect a Federal project.

11. Permit Evaluation/Public Hearings.

- ***Corps runs the permit process***
- ***Corps determines public hearing need***
- ***Do not hold public hearings just because project controversial***
- ***Use public meetings and workshons***

The Corps is the Decision-maker. Always remember that the Corps is in charge of the Regulatory Program and is responsible and accountable for all aspects of the decision as well as the quality and efficiency of its

administration. This is particularly true for projects that generate considerable controversy and/or comments from other Federal, State, local environmental agencies and the public. The Corps Regulatory Program does not rely on reaching consensus, but relies on gathering sufficient

information for the Corps to make its decision. The Corps determines the project purpose, the extent of the alternatives analysis, determination of which alternatives are practicable, which are less environmentally damaging, the amount and type of mitigation and all other aspects of the decisionmaking process (RGL 92-1). Once the appropriate information is gathered, the Corps must move in a timely manner to make a decision. The Corps decides what is relevant in evaluating projects. This responsibility must not be transferred to another agency or the public. Additional coordination after the close of the PN period should focus on the issues under consideration, be managed by the Corps and be concluded as soon as possible. The Corps must stay involved in the project, and be decisive when evaluating information from all sources.

Level of Review. Delegate signature authority to the lowest level possible. For routine SPs and GPs with PCNs, normally an individual other than the one who reviewed the application and prepared the permit instrument should sign the verification letter or permit. In other words, these situations should require at least one reviewer who may be the same individual that signs the work of the other person. More controversial actions will normally involve more than one reviewer, and may include reviews by Counsel. More controversial SPs may need to be signed by district commanders. Districts may choose to have such a level of review for non-reporting GPs depending on the specific circumstances, or for controversial determinations that no permit is required. However, as a general rule, project managers may sign letters confirming the applicability of non-reporting GPs, including NWP (without additional review) as well as letters confirming that no permit is required.

Forwarding Comments. In the letter (normally one letter succinctly stating Corps position) from the Corps to the applicant forwarding comments received on the proposed project, the Corps will alert the applicant of substantial unresolved issues for which the Corps requires information. This is a critical part of the permit evaluation process. The most important issues needing resolution should be stressed in the subject letter. Formulate questions clearly and ask for detailed information directed at resolving specific issues raised during the comment period. The Corps will state its information needs, as well as the Corps position on comments forwarded to the applicant. The Corps is mandated to protect the public interest. However, the scope of project analysis limits the issues that are relative to the permit decision. Tell the applicant which issues must be addressed and which do not need to be addressed. Anticipated impacts should be measurable, not conjecture and be related to the project under consideration. In the comment letter, notify the applicant of relevant issues raised in the comment letters and those identified by the Corps independent of the PN process. This is also a good opportunity to reiterate program requirements. Also, inform the applicant of the affects of special conditions that may be warranted due to compliance with Section 401 certification, Coastal Zone Management Act (CZM), Section 106 of the National Historic Preservation Act (NHPA), or the ESA.

Evaluating the Applicant's Response. The Corps must determine the adequacy of the applicant's response. Applicants will only be asked by the Corps to respond to comments on concerns that the Corps has determined are relevant to the decision process. If the applicant's response does not adequately address the issues, the Corps must respond accordingly and in a timely manner. A phone call can generally suffice for one or two deficiencies, however, a letter reiterating the unresolved issues should follow for more controversial applications. The Corps should not tell

applicants what to write, however, the Corps should be informative and advise applicants exactly what information is required and the questions that need to be answered. Document phone calls in the file. Emphasize that information was asked for previously. The Corps will not bargain with the applicant about the type of information needed, or the nature of the response. In most cases, applicants are cooperative. However, if necessary, advise the applicant that if the required information is not provided, the Corps will withdraw the permit application. Do not allow projects to become unmanageable by accepting a series of partial responses. The Corps must have sufficient information to make and substantiate a decision on the permit application. If the applicant asks for additional time to complete the response, the request should normally be granted. Should the applicant's response generate additional substantial concerns or questions, the Corps may request additional information from the applicant, and re-coordinate the project with interested agencies.

Public Hearings. Public hearings are held at the discretion of the district commander only where a hearing would provide additional information not otherwise available which would enable a thorough evaluation of pertinent issues. Districts will receive numerous requests for public hearings, especially in connection with controversial projects with high public visibility. However, unless a public hearing would serve the aforementioned purpose, district commanders will deny the requests for public hearing's. Districts should consider: (1) the extent to which the issues identified in conjunction with a request for a public hearing are consistent with the Corps need to make its Guidelines and public interest determinations, that is the extent to which the issues are within the Corps scope of analysis; (2) the extent to which the issues identified in conjunction with a request for a public hearing represent information not otherwise available to the Corps; and (3) whether the issues identified are already addressed by responses to the PN. Districts should also consider public meetings or workshops, which can be targeted towards a particular group of objectors and/or issues. These are more informal forums, much less expensive, that provide a higher interaction with a smaller segment of the concerned public.

12. Appropriate Level of Analysis Required for Evaluating Compliance with the Section 404(b)(1) Guidelines Alternatives Requirements (see RGL 93-2).

- *Corps determines appropriate level of Guidelines analysis*
- *Focus on environmental impacts, ensure rigor of alternatives analysis is commensurate with impacts to aquatic environment*

The amount of information needed to make such a determination and the level of scrutiny required by the Section 404(b)(1) Guidelines must be commensurate with the severity of the environmental impact (as determined by the functions of the aquatic resource and the nature

of the proposed activity) and the scope/cost of the project. The Corps must focus its resources on evaluations that focus on the aquatic impacts, and provide value added for protection of the aquatic environment.

Although all requirements in 40 CFR 230.10 must be met, the compliance evaluation procedures will vary to reflect the seriousness of the potential for adverse impacts on the aquatic ecosystems. The Corps must keep in mind that it regulates the total aquatic environment, not just wetlands.

Often other aquatic resources such as seagrass beds, submerged fresh water aquatic vegetation, and hard bottom areas are as or more ecologically valuable than wetlands.

It always makes sense to examine first whether potential alternatives would result in no identifiable or discernible difference in impact on the aquatic ecosystem. Those alternatives that do not, may be eliminated from the analysis since Section 230.10(a) of the Guidelines only prohibits discharges when a practicable alternative exists which would have less adverse impact on the environment (this includes consideration of impacts of the proposed project and alternatives on non-aquatic as well as aquatic resources).

By initially focusing the alternatives analysis on the question of impacts on the aquatic ecosystem, it may be possible to limit (or in some instances eliminate altogether) the number of alternatives that have to be evaluated for practicability (an inquiry that is difficult, time consuming, and costly for applicants).

The level of analysis required for determining which alternatives are practicable will vary depending on the type of project proposed. The determination of what constitutes an unreasonable expense should generally consider whether the projected cost is substantially greater than the costs normally associated with the particular type of project.

It is important to emphasize, however, that it is not a particular applicant's financial standing that is the primary consideration for determining practicability, but rather characteristics of the project and what constitutes a reasonable expense for these types of projects that are most relevant to practicability determinations.

The analysis of alternatives, pursuant to the Guidelines will also satisfy NEPA, which also requires the analysis of alternatives. Therefore, districts should not conduct or document separate alternatives analyses for NEPA and the Guidelines. The only fundamental difference between alternatives analyses for NEPA and the Guidelines is that under NEPA, alternatives outside of the applicant's control may be considered. If such an analysis is conducted, simply document the findings, under the appropriate title, within the combined alternatives discussion.

Other Federal agencies (e.g., Federal Highway Administration/State Departments of Transportation (DOT)) routinely prepare NEPA documentation, containing alternatives analyses, in conjunction with projects which require Corps permits. Districts should strive to communicate the Guidelines alternatives analysis requirements to the lead agency to enable that agency to conduct an analysis of alternatives to satisfy Guidelines requirements and avoid the need for the district to have to conduct a subsequent analysis. For example, State DOTs prepare NEPA documents to analyze alternative corridor alignments for new highways. To the extent that any of these proposed alignments involve waters of the United States and require an SP, the State DOT NEPA document should incorporate Guidelines alternatives requirements into the analysis of corridor alternatives.

13. The Public Interest Determination.

- *Corps responsibility*
- *Refer to 33 CFR 320.4*
- *Provides environmental as well as public interest protection*
- *Require mitigation*
- *Analyze alternatives*

The public interest determination involves much more than an evaluation of impacts to the aquatic environment, including wetlands. Once the project has satisfied the Guidelines, the project must also be evaluated to ensure that it is “not contrary to the public interest” (33 CFR

Part 320.4). There are 20 public interest factors listed in 33 CFR 320.4. A project may have an adverse effect, a beneficial effect, a negligible effect or no effect on any or all of these factors. The Corps must evaluate the project in light of these factors, other relevant factors and the interests of the applicant to determine the overall balance of the project with respect to the public interest.

The public interest review is a balancing test by the Corps of the foreseeable benefits and detriments of proposed projects. The following general criteria of the public interest review must be considered in the evaluation of every permit application (33 CFR 320.4(a)(2)):

- a. The extent of the public and private need for the project.
- b. Where unresolved conflicts exist as to the use of a resource, whether there are practicable alternative locations or methods that may be used to accomplish the objective of the proposed project.
- c. The extent and permanence of the beneficial or detrimental effects the proposed work is likely to have on the private and public uses to which the project site is suited.

The decision whether to authorize or deny the permit application is determined by the outcome of this evaluation. The specific weight each factor is given is determined by its relevance to the particular proposal. It is important to remember that the Corps can perform an alternatives analysis, and may require compensatory mitigation, or other conditions to address environmental impacts for all permits, including Section 10 only permits. For each application, a permit will be granted unless the district engineer determines that it would be contrary to the public interest to do so (33 CFR 320.4(a)).

Level of Review. Delegate signature authority to the lowest level possible. For routine SPs and GPs with PCNs, normally an individual other than the one who reviewed the application and prepared the permit instrument should sign the verification letter or permit. In other words, these situations should require at least one reviewer who may be the same individual that signs the work of the other person. More controversial actions will normally involve more than one reviewer, and may include reviews by Counsel. More controversial SPs may need to be signed by district commanders. Districts may choose to have such a level of review for non-reporting GPs depending on the specific circumstances, or for controversial determinations that no permit is required. However, as a general rule, project managers may sign letters confirming the

applicability of non-reporting GPs, including NWPs (without additional review) as well as letters confirming that no permit is required.

14. Section 401 Certification and Coastal Zone Management.

- *Use provisional permits*
- *Establish dates and deadlines*
- *Use discretion in enforcement of 401/CZM conditions*

Provisional Permits. Obtaining Section 401 Water Quality Certification (WQC) and CZM consistency can result in substantial delays in issuing Section 404 and Section 10 permits. To avoid unreasonable delays

in Corps permit processing, the following actions are recommended. In cases where the Corps has finished its evaluation of a permit proposal and the only action remaining is the issuance of the Section 401 certification or CZM consistency concurrence, the Corps should send a provisional permit to the applicant. Sending a provisional permit completes the Corps action on the proposal and notifies the applicant of the need to obtain a Section 401 certification or CZM concurrence from the certifying agency before the Section 404 permit is valid. The provisional permit also places the only remaining action with the certifying agency, properly focusing the applicant on the State. RGLs 93-1 and 92-04 discuss provisional permits and Section 401 coordination.

401/CZM Deadlines. In the interest of expediting the review of permit applications, districts are encouraged to establish deadlines for reaching certification or issuing/assuming waiver of certification with the appropriate 401 certifying agencies and consistency with CZM. The recommended deadlines are between 60 days and 120 days on 401 certifications and 60 days to 90 days for CZM. If an established deadline is passed without action by the Section 401 certifying agency the Corps will consider the 401 certification waived, and/or presume CZM consistency and proceed with the issuance of a permit. In addition, districts should establish an agreement with the certifying agencies stating that the issuance of a PN by the Corps constitutes a request for Section 401 certification and CZM consistency, and the PN date identifies the day from which the aforementioned deadlines should be established. The maximum amount of time allowed for a 401 certification agency to reach a decision is one year. The maximum amount of time for a coastal zone consistency certifying agency to reach a decision is six months.

401 Conditions. For projects that require Section 401 authorization, all special conditions of the 401 certification must be incorporated into the DA permit. The incorporation of Section 401 conditions is a necessary part of the Corps permit program. In all cases, the 401 conditions will be incorporated by reference to the 401 certification and a copy of the 401 certification must be attached to the permit. Section 401 or CZM conditions are subject to discretionary enforcement by the Corps. In addition, Section 401 conditions may not be appealed, pursuant to the appeals process.

Withdrawal of 401/CZM Certification. If a State withdraws its WQC or CZM certification after the Corps permit is issued, the district does not have to automatically suspend or revoke the Corps permit. Rather, the district should review the circumstances which lead to the State's actions and, to the extent these circumstances bear upon the district's Guidelines compliance or

public interest determinations, consider whether to leave the permit in place, modify, or rescind the permit. If the district decides to leave the permit in place, subsequent work by the permittee may be considered in violation of State law and subject to State enforcement procedures.

Applicability to Section 10 Activities. Section 401 certification of Section 10 only activities is not required unless the Section 10 permit involves a discharge into waters of the United States. Section 10 only projects normally do not result in a discharge, which is what triggers the need for 401 certification. For example, the installation of piers, docks, and similar structures do not require a Section 401 certification because there is normally no discharge associated with the project. If the state issues a 401 certification for a Section 10 only activity (no discharge) then those conditions do not become part of the DA permit unless the Corps adopts them, as Corps required conditions.

15. Endangered Species Act (ESA).

- ***Corps determines no effect/may effect and no jeopardy/jeopardy***
- ***Corps decides whether to include RPAs***
- ***Applicant must comply with take statement***

With respect to the conditioning of permits for applications that have undergone consultation as defined in the ESA, the Corps will decide what if any conditions are appropriate for inclusion into a Section 404/10 permit (if the Corps issues a permit all elements of the incidental take statement

must be included by reference – see below). The ESA consultation may result in the drafting of a biological opinion (BO) by the USFWS/NMFS. The BO may include a number of reasonable and prudent alternatives (RPAs), an incidental take statement, and conservation recommendations. Biological Assessments (BA) are the responsibility of the Corps, but are only required for projects that involve an EIS. There are specific requirements for preparing a BA in the FWS regulations. Districts may choose to provide some limited assessments of impact with non-EIS Section 7 consultations. These limited assessments of the impact do not need to meet the BA criteria. Of course, in all Section 7 consultations the Corps (the applicant may provide the information to the Corps) must provide any other available information that is relevant to our permit decision.

The incidental take statement contains limits, reasonable and prudent measures, terms and conditions, and instructions to handle or dispose of any taken species. The applicant must implement and comply with the requirements of the incidental take statement in order to legally take a listed species, which may result from the construction or operation of the permitted activity. The Corps issuance of a permit is not considered to be a take of listed species by the Corps, should such take occur as a result of the applicant's activities. The Corps permit will contain a condition indicating that the applicant must comply with the incidental take statement should the applicant take a listed species. Such permit condition will further indicate that the Services will be informed of and enforce any known violations of the incidental take statement.

Reasonable and prudent alternatives are items identified in the USFWS/ NMFS BO that the USFWS/NMFS believes will ensure a determination of no jeopardy to a federally listed species or no degradation or adverse modification of critical habitat. The Corps considers all RPAs developed by the USFWS/NMFS, and decides which will be included in any Section 404/10

permit issued by the Corps. RPAs will be required by the Corps only to the extent that they are necessary for the Corps to make its determination that the authorized activity is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. If the Corps decides to issue a permit without including the RPAs in the BO, the permit decision document must explain why the species will not be jeopardized.

Conservation recommendations will only be included as permit conditions, if the applicant so requests in accordance with 33 CFR 325.4.

50 CFR 402.08 provides for the designation of non-federal representatives to conduct informal consultation or to provide biological assessments and other information to be provided to the Services for Section 7 consultation. Districts should make use of the designated non-federal representatives in appropriate cases. However, the ultimate responsibility for compliance with Section 7 remains with the Corps.

16. Documentation - Environmental Assessment, Statement of Findings, 404(b)(1) Guidelines Compliance, EISs, and Standard Compliance Statements.

- *Focus on issues relevant to decision in documentation*
- *Focus on impacts within Corps scope of analysis to determine if EIS required*
- *Applicants pay for Regulatory Program EISs*

Documentation. The documentation of this process is variously referred to as a SOF/EA or a combined decision document which incorporates both the EA and SOF. A combined decision document should be used to consolidate discussion on project

impacts and alternatives. The decision document will describe the proposed project, including any important on-site environmental features directly affected by the project, the regulation(s) under which the proposal is being reviewed (RHA, CWA, NEPA, ESA, etc.), a chronology of events since the application was received, including a summary of all comments received, and a final decision. The decision document must also include an EA that supports the decision (a findings of no significant impact (FONSI) or a findings of significant impact necessitating the preparation of an EIS), and if the project involves a discharge of dredged or fill material into waters of the United States, analysis of compliance with the 404(b)(1) Guidelines. The decision document should discuss all relevant public interest review factors, incorporate the findings of this review, include the 404(b)(1) Guidelines review and conclude with a public interest determination. The decision document must include the items listed above, even if no comments are received on the PN. However, brief one sentence discussions or checklists for public interest factors and the 404(b)(1) Guidelines should be used for routine SPs and LOPs.

Evaluating PN comments can be one of the more difficult and time-consuming tasks associated with completing a decision document. The issues raised in comment letters can vary widely, and may or may not be relevant to the Corps jurisdiction, or to the public interest factors. Nevertheless, all comments received need to be addressed in the decision document including the irrelevant ones and those that exceed the scope of the project under consideration. The farther an

issue is removed from the area of jurisdiction or from the identified public interest factors (water quality, aquatic habitat, endangered species, navigable waters, historic resources, etc.), the less weight it will have in the decision making process. The level of importance each issue receives in the decision process, and therefore, the amount of attention in the decision document should be proportional to its association with the regulated activity. Comments on issues that are outside the Corps Regulatory Program scope can be addressed with one sentence stating that the issue is outside the Corps Regulatory Program.

It is often helpful to summarize the comments received into statements that can be categorized for evaluation, especially for projects where many comments are received (e.g., wetlands, air and water quality, noise, traffic, floodplain impacts). Some of the comments may be unrelated to the Corps regulatory mandate, such as alleged overcrowding of local public schools, project compliance with local land use plans and local ordinances. These issues can be grouped together, and briefly discussed in one paragraph of the decision document, with emphasis that they are beyond the scope of Corps review. Lastly, the comments that are essential to the public interest review (e.g., Corps jurisdiction or regulations, and other Federal involvement) should be identified and examined in the level of detail necessary to reach a decision. Not all issues are equally important; focus on the major issues that form the basis or the "equation" for the district's final permit decision. Remember that it is the district's responsibility to establish a point in the evaluation process when there is sufficient information on the major issues to proceed with a decision.

Consider comments from other Federal and State agencies carefully, keeping in mind that these comments presumably reflect the mandated interests of that agency and should be focused on the agencies expertise (e.g., fish and wildlife values from the USFWS). However, the other agencies concerns may not be relevant to the action under review. For example, under its mandate a State's natural resource agency may be interested in preserving upland habitat for game species or songbirds within a subdivision development. However, those upland concerns may not outweigh impacts to the aquatic environment that are germane to the Corps conclusions regarding the public interest and the Guidelines. To foster good Government and to inform the applicant, the Corps can transmit the natural resource agency's concerns, to the applicant. However, no response is required from the applicant for such items unless there is a strong link to the Corps regulatory responsibility. In addition, the Corps should refrain from placing special conditions on a permit that are beyond reasonable Federal control (e.g., posting signs for hours or operations of a boat ramp, upland lighting requirements), unless requested to do so by the applicant (33CFR 325.4) or determined necessary to comply with Federal laws such as the ESA.

Carefully consider all requests for a time extension of the PN comment period, whether the request comes from an agency or from a private individual. The requesting party must justify why the PN should be extended. If the stated reasons for requesting the extension are not reasonable and substantive, the request should be denied. For the Corps to consider such a request, it must be received prior to the expiration of the PN.

EISs. The Corps determines if an EIS is required on any particular IP. EISs should only be prepared when they are legally required; that is when the district concludes that its permit decision will significantly affect the quality of the human environment after consideration of any mitigation the Corps would require. Districts will receive numerous requests to prepare EISs, especially in connection with controversial projects with high public visibility. In some instances, despite a relatively minor permit action, districts may find themselves pressed to prepare EISs because the Corps represents the only Federal agency with permit authority and, therefore, the only authority to require that such a document be prepared (e.g., a GP for a minor road crossing in conjunction with a large project for which non-related upland endangered species and/or historical property impacts are projected). It is inappropriate for districts to prepare EISs under these circumstances, i.e., the Corps is the only agency with jurisdiction or “the only game in town.” The district must carefully evaluate the proper scope of analysis under 33 CFR 230.7, 1988 NEPA regulation (33 CFR 325, Appendix B) and not expand that scope of analysis just because others request such action. Unless the district’s permit decision, with the proper scope of analysis, would result in impacts significantly affecting the quality of the human environment, districts will not prepare an EIS. Districts should apply paragraph 7. of Appendix B, 33 CFR 325 of the Corps regulations and determine: (1) the scope of analysis (that is the activities and geographic range associated with project impacts); and (2) whether those impacts within the Corps scope of analysis constitute a significant impact on the quality of the human environment. If an EIS is required, the applicant must furnish the necessary information for the Regulatory Branch’s review. The CEQ’s 40 questions fully supports the Corps approach of preparing a mitigated “FONSI.” The determination of significance of impacts is done AFTER considering all mitigation. Where a limited scope of analysis is involved, the Corps should describe briefly the basis of the scope of analysis in the decision document.

Regarding the financing of EIS preparation, refer to the HQUSACE memorandum of 17 December 1997, from the Director of Civil Works to Major Subordinate Commanders and District Commanders, subject: Guidance on EIS Preparation, Corps Regulatory Program. The substance of that memorandum is repeated below.

“1. Appendix B, 33 CFR Part 325,” provides policy guidance on preparation of NEPA documents for the Corps Regulatory Program. This regulation provides that the district engineer may prepare an EIS or may obtain information to prepare an EIS, either with his/her own staff or by choosing a contractor, either at the expense of the Corps or the expense of the applicant, who reports directly to the district engineer (see paragraph (3), 8b, 8c, and 8f). Due to budgetary constraints, preparing a project specific EIS at the expense of the Corps can no longer be funded.

2. Effective immediately, any Corps district preparing an EIS on a permit action will use a “third party contractor” as the primary method to prepare all or part of a project specific EIS or to obtain required information (40 CFR 1500-1508).

“Third party contract” refers to the preparation of an EIS by a contractor paid by the applicant but who is selected and supervised directly by the district engineer

(Corps Regulatory Branch). (See 40 CFR 1506.5(c) and Council on Environmental Quality's (CEQ) Forty Most Asked Questions Concerning CEQ's NEPA Regulations, #16 and #17). Contractors election by the Corps for a Regulatory Program EIS will be as follows: The Corps will select from the applicant's list the first contractor that is fully acceptable to the Corps, using the applicant's order of preference. The procedures outlined in 40 CFR 1500-1508 and CEQ's forty questions must be followed. Furthermore, the Corps is responsible for final acceptance of the draft and final EIS.

3. Appendix B, 33 CFR Part 325, provides that the district engineer may require the applicant and/or his/her consultant to furnish information required for an EIS. The applicant and/or his/her consultant will then provide the information for the Corps use in preparing an EIS. This is an option which may be utilized in preparing a project specific EIS; however, to manage Corps resources more efficiently and equitably, this approach will be utilized by a district in preparing a project specific EIS only when for some reason the third party contracting cannot be used. If this method is used, the applicant is responsible for providing required information and data to the Corps. The Corps is responsible for review and acceptance of required information, data, or drafts and must be especially vigilant in identifying and eliminating any bias that could exist in a draft NEPA document prepared by a contractor selected and supervised by an applicant. The district engineer (Corps Regulatory Branch) has the final determination for EISs prepared by the applicant and his consultant of whether the data provided is adequate and accurate. The Corps will carefully review the applicant's drafts to ensure they are technically adequate and not biased.

4. Of course, a programmatic EIS will still have a substantial portion of the effort conducted and funded by the Corps. However, even for programmatic EISs, the Corps can, and should, identify applicant groups, States, and/or local Governments to cost share in the effort. Whenever an agency prepares a programmatic EIS, the requirements of 40 CFR 1506. 1(c) present potential legal and practical problems for processing any Corps permit related to the programmatic EIS (especially if the permit would require a project specific EIS). For that reason and due to budget implications, any decision to do a programmatic EIS will be reviewed and approved by CECW-OR before a commitment is entered into for any programmatic EIS.

5. Due to Regulatory Program budget limits, all Regulatory Program EISs must be managed in the Regulatory Branch and primarily reviewed in the Regulatory Branch. The Regulatory Branch will only contract out work to other Corps elements, other Federal agencies, or private consultants, when additional expertise beyond that available in the Regulatory Branch is necessary or where it makes good business sense for the Regulatory Program.

Statement of Findings Standard Compliance Statements. The following statements must be included in all SOFs.

a. Section 176 (c) of the Clean Air Act General Conformity Rule Review: A statement must be included in the SOF that the proposed project has been analyzed for conformity applicability, pursuant to regulations implementing Section 176(c) of the Clean Air Act and that it has been determined that the activities proposed under this permit will not exceed de minimis levels of direct emissions of a criteria pollutant or its precursors and are exempted by 40 CFR Part 93.153. Statements must also be included that any later indirect emissions are generally not within the Corps continuing program responsibility, that these emissions generally cannot be practicably controlled by the Corps, and, for these reasons, a conformity determination is not required for a permit.

b. Public Hearing Request: A statement must be included in the SOF as to whether a public hearing was requested and by whom (e.g., a Senator, 200 requests). This statement should be followed by the district engineer's decision on whether to hold a public hearing and the summary rationale. It is sufficient to state, "I have reviewed and evaluated the requests for a public hearing. There is sufficient information available to evaluate the proposed project; a public hearing would not result in information that is not already available, therefore, the requests for a public hearing were denied," in the SOF. However, there may be a need to elaborate on this in the EA.

c. Compliance with 404(b)(1) Guidelines: If applicable, a statement must be included that the project has been evaluated for compliance with the Section 404(b)(1) Guidelines. This should be followed with statements and summary information which conclude whether the project represents the least environmentally damaging, practicable alternative, whether the project complies with all applicable State and Federal criteria, whether the project will result in significant degradation of the aquatic environment, and whether appropriate and practicable mitigation has been required to offset the permitted loss of aquatic functions. A summary statement that the project complies or does not comply with the Guidelines should also be included.

d. Public Interest Determination: A statement must be included noting whether the project is or is not contrary to the public interest and contain summary information on each relevant public interest factor.

e. Finding of No Significant Impact: A statement that the project will/will not result in significant impacts to the quality of the human environment and, therefore, the preparation of an EIS is/is not required.

Special Studies. The Corps is often approached to contribute Regulatory Program funds or to seek additional Federal funding in support of special studies. Districts should check with divisions first, then CECW-OR before committing Regulatory Program funds.

17. Conditioning Permits.

- *Easily enforceable*
- *Must relate to environmental protection or the public interest*
- *Must be justified in documentation*
- *Include 401/CZM conditions*

Special conditions placed on a Corps permit should be limited to those necessary to comply with the Federal law, while affording the appropriate and practicable environmental protection, including

offsetting aquatic impacts with compensatory mitigation (see 33 CFR 325.4 – read carefully). There must be sufficient justification in the administrative record to warrant the conditions and the conditions should be easily enforced. All Corps imposed conditions should be substantially related to the impacts (e.g., Corps authorizes impacts to the aquatic environment, thus protection of uplands, except as buffers to open waters, are not appropriate unless the applicant specifically requests such conditions). Under the Corps Administrative Appeal Process, once a standard permit is issued, its terms and conditions may be appealed to the division engineer. In the appeal process, any condition that is not sufficiently justified in the administrative record is subject to removal or modification. Section 401 and CZM conditions may not be appealed through the Corps administrative appeals process.

Permit conditions should be developed so they are easily enforced, and relate to issues raised in the public interest review process (e.g., the aquatic environment, the ESA, navigation, cultural resources). Conditions to State 401 WQCs must be included as conditions of all Section 404 permits. CZM consistency conditions must also be included as conditions of Corps permits. Both 401 and CZM conditions should normally be in the form of one condition referencing the enclosed State conditions. Special conditions should not be used for the purpose of complying with State laws or local ordinances. An example of a well structured condition for a mitigation plan may require the date of the drawings, a monitoring and planting plan (with success rates), deed restrictions, and other narratives that describe the mitigation area. In many situations, more than one individual works on a project, particularly when compliance and/or enforcement are involved. Therefore, it is essential that permit conditions should be developed with a focus towards ease in interpretation. The number of special conditions should also be held to the minimum necessary to protect the aquatic environment, and to ensure compliance with Federal law. Given the high workload requirements associated with mitigation requirements (e.g., multiple inspections, review of annual reports, agency coordination), enforcement of all conditions may not be possible. Therefore, the importance of writing clear, easily enforceable conditions cannot be overstated. While all Section 401 conditions must be attached to the Section 404 permit, the Corps should only seek to ensure compliance of those conditions that most closely relate to our jurisdiction. Use enforcement discretion for 401 and CZM conditions, dependent on resource limitations.

It some cases it may be appropriate to require the recording of deed restrictions, land covenants, or conservation easements as a condition of a DA permit. The deed restrictions may involve wetlands or uplands, when required, to sufficiently protect/mitigate the aquatic resources associated with the permitted action. The need for covenants should also be justified in the administrative record. Special justification

should be referenced where upland buffers are incorporated into the decision. This is because the Regulatory Program does not address or mitigate for losses of upland resource functions. However, the inclusion of upland buffer areas, although not usually associated with the requirements of the CWA, can add numerous benefits to the value of an aquatic environment and districts are encouraged to condition permits and give mitigation credit accordingly. The record should identify specific functions that the upland buffer perform, such as water quality benefits, aquatic species habitat support (e.g., shading), or watershed protection and should not be based solely upon upland habitat values to wildlife.

18. Compensatory Mitigation.

- *Corps determines mitigation*
- *Replace lost functions*
- *Require permittee reporting*
- *Compliance inspections essential*
- *Provide clear, enforceable permit conditions*
- *Use best professional judgement*

Mitigation is a critical part of the Corps Regulatory Program. The following is a focus on the mitigation policy and the source of that policy, under which the Corps should be operating the Regulatory Program, as well as some basic concepts that districts should consider in formulating compensatory mitigation.

Mitigation Policy.

a. Corps 1986 Consolidated Rule (33 CFR 320.4(r)): The mitigation policy in the Corps consolidated rule applies to all permit actions (unless superceded by the Mitigation MOA with regard to Section 404 actions), including Section 10 permits. The mitigation policy in the consolidated rule: (1) reiterates the CEQ types of mitigation, avoiding, minimizing, rectifying, reducing, or compensating for resource losses; (2) provides that compensatory mitigation may be on site or off site (no preference); (3) stipulates that losses will be avoided to the extent practicable; (4) considers project modifications as a form of mitigation; (5) pertains to legal requirements (ESA, 106, 404(b)(1) Guidelines, etc.); (6) addresses public interest impacts; (7) provides for the Corps to accept any additional mitigation the applicant requests to be added; and (8) stipulates that all mitigation should be directly related to the proposed work, should have a link to the aquatic environment (this includes upland buffers to flowing or other open waters) and appropriate to the degree and scope of the proposed impacts to waters of the United States.

b. CEQ Mitigation Policy (CEQ 1978 Regulation (Definitions Section at 1508.20) and 40 Questions: As previously indicated, the CEQ regulations contain the same definition of mitigation as the Corps consolidated rule. The CEQ 40 questions on its regulation state that mitigation can be used to offset impacts to the level of non-significance, thus our NEPA documents are essentially all EAs, with a FONSI, based on mitigation. This is one of the required compliance statements in all Corps SOF documents.

c. The DA – EPA 1990 MOA on Mitigation: The Mitigation MOA, which applies only to standard individual permits (IPs) under Section 404: (1) establishes the mitigation sequence, avoid, minimize, and then compensate to extent practicable, for remaining unavoidable losses; (2) reiterates that significant degradation (40 CFR 230.10(c)) can be offset by compensatory mitigation to the level of non-significance; and (3) reiterates the requirement that the Corps should require mitigation to ensure no significant degradation of the waters of the United States occurs.

d. 1995 Mitigation Banking Guidance (Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, published in the Federal Register on November 28, 1995). The mitigation banking guidance provides detailed guidance on the formulation and management of mitigation banks. This guidance establishes criteria regarding both on site versus off site and in kind versus out of kind mitigation and concludes that the Corps should require the mitigation that is best for the aquatic environment (no a priori preferences). It is the district's call on what is best ecologically, normally on a watershed basis. In other words, the Corps should keep mitigation in some “district defined” watershed to offset the impacts (increasingly the Corps will probably use United States Geological Survey watershed catalogue units). Sometimes it is not possible to keep mitigation in the watershed where the impact occurs, nor does it make ecological sense to do so. In such cases, the Corps may require mitigation outside of the watershed. This approach (what is best for the aquatic environment) should guide all the district’s mitigation decisions, not just for mitigation banks.

e. NWP Regulation (33 CFR 330): The NWP regulations: (1) stipulate that the Corps will require compensatory mitigation to the extent necessary to ensure no more than minimal adverse environmental effects, both individually and cumulatively; (2) contain Condition 13, which has explicit requirements for mitigation to the extent that adverse effects on the aquatic environment are minimal; (3) contain Condition 20 (current 404 only condition 4), which requires onsite minimization and avoidance to the extent practicable; and (4) reiterates the Guidelines policy that the offsite alternatives analysis does not apply to any GP, including NWP’s.

Mitigation Concepts. In addition to the above, the following concepts should be considered in determining mitigation requirements for projects:

a. The amount of mitigation required should be commensurate with the anticipated impacts of the project. The goal of mitigation is to replace aquatic resource functions and other impacts.

b. The aforementioned 1990 EPA/DA MOA establishes a preferred sequence of on-site/in-kind mitigation to off-site/out-of-kind approaches, however, districts should not consider this a required hard and fast policy. Corps field experience has shown ecological value in pursuing practicable and successful mitigation within a broader geographical context. This approach, combined with innovations such as mitigation banks and in-lieu-fee programs, provides proportionately higher ecological gains where the aquatic functions are most needed. The Corps depends on regulators reviewing

relevant agency and public comments and applying their best professional judgement in requiring appropriate and practicable mitigation for unavoidable, authorized aquatic resource impacts. The bottom line test for mitigation should be what is best for the overall aquatic environment.

c. Districts may choose to use a timely and efficient aquatic resource assessment methodology. It is useful, but not required, that the assessment method be agreed upon by the coordinating Federal and State agencies. It is particularly important to work with State and local regulatory agencies. The use of an agreed upon method will help ensure a degree of uniformity and fairness concerning the assessment of functions as well as mitigation requirements, including a quantified replacement of functions.

d. The Corps decides what is appropriate and practicable mitigation, not the coordinating agencies. The Corps should consult with other agencies in determining appropriate mitigation, but the Corps makes the final decision. Different agencies operate under different mandates and may have conflicting recommendations. It is up to the Corps to review comments received and reach a defensible and reasonable conclusion.

e. The use of conservation easements or deed restrictions can be an important part of a mitigation plan. The use of these tools is encouraged where feasible. Each district should develop a standard procedure and format to facilitate the use of deed restrictions and easements.

f. Districts will inspect a relatively high percentage of compensatory mitigation, to ensure compliance with permit conditions. This includes SPs and GPs. This is important because many of the Corps permit decisions require (and presume the success of) compensatory mitigation to offset project impacts. To minimize field visits and the associated expenditure of resources, SPs and GPs with compensatory mitigation requirements should require applicants to provide periodic monitoring reports and certify that the mitigation is in accordance with permit conditions. Districts should review all monitoring reports.

g. Districts will inspect all mitigation banks to ensure compliance with the banking agreement. Mitigation banking is an important part of the Regulatory Program because it represents an efficient and effective way to offset authorized aquatic resource impacts.

19. Duration of Permits.

- Permit duration is the Corps discretion

The timeframe that an IP is valid is, with two exceptions, at the discretion of the district engineer. The first exception is for permits issued for the transport and disposal of dredged material in ocean waters, which can be valid for no more than 3 years (33 CFR 325.6(c)). The second is for maintenance dredging permits, which can be valid for a maximum 10 years from date of issuance of the permit originally authorizing the dredging (33 CFR 325.6(e)). For all other IPs, the

duration, “will provide reasonable times based on the scope and nature of the work involved.” The time limit commonly used for IPs involving construction is 3 to 5 years. Use of 5-year construction periods reduces the need to extend permits. However, the regulations (33 CFR 325.6) allow for flexibility on this issue. For example, Disney World in Orlando, Florida was issued a permit with a duration of 20 years in order to accommodate the construction of this huge project in manageable phases.

20. Permit Modifications and Time Extensions.

- *Extend/modify permits to the extent practicable*
- *Requests for extensions must precede expiration date*

Project managers are encouraged to use time extensions and permit modifications to the extent practicable to increase efficiency. Time extensions on existing permits will normally be granted where the project has not

changed, and the regulation and policy framework are substantively the same as existed for the original decision. While time extension requests are generally reviewed favorably, it is imperative that written requests for the extension are received prior to the expiration of the permit in question (preferably within 30 days prior to their expiration). As long as the request for extension is received prior to expiration of the permit, the Corps decision may be made after the original expiration date.

When reviewing a request for a permit modification, it is important to remember that changes to the site plan are not the deciding factor in determining the need for a new permit review. The deciding factor is the probable impacts to the aquatic environment or other aspects of the public interest, not the configuration of the project, or the preferred method for carrying out the work. If issues directly related to Corps jurisdiction are substantial (e.g., substantial increases in the fill footprint are proposed) a modification will normally be subject to a PN. If impacts to the aquatic environment are less than the original proposal, a modification to the original permit should be executed quickly without a PN. Agency coordination may not be necessary for non-controversial projects, unless the District believes the net overall changes/impacts to the aquatic environment are greater. Modifications for controversial projects (e.g., those that involve an endangered species or significant historic resource) should normally involve agency coordination. Not all agencies need to be notified of proposed modifications. For example, a modification that would only affect historic resources might be of little interest to the EPA and the USFWS. Notification in such a case would be appropriately restricted to the State Historic Preservation Officer or to parties who commented on historic resource issues during the PN comment period. A brief supplemental decision document should be prepared for permit modifications since these are final permit decisions.

21. Enforcement/Compliance.

- *Maintain a viable enforcement program*
- *Prioritize workload*
- *Require permittees' compliance reports*
- *No surveillance as a discrete activity*

It is important to maintain a viable enforcement program. Enforcement of unauthorized activities as well as activities that are not in compliance with permit requirements is a necessary

component to the Regulatory Program. Districts will prioritize inspections and subsequent actions based on compensatory mitigation, local hot spots, endangered /threatened species, cultural resources, navigation concerns, or other controversial issues which the district considers important (e.g., Corps enforcement of Section 401 or CZM conditions is discretionary). There are national and district-specific performance measures currently in development that may serve to prioritize compliance inspections. Districts should require permittees (recipients of SPs as well as GPs) to periodically supply reports with pictures on compensatory mitigation projects to assist in the district's review of compliance. Districts will require all permittees (SPs, LOPs, RGP, NWPs) to submit a self certification statement of compliance as provided in the NWP program.

Every attempt should be made to resolve violations of permit conditions and unpermitted activities by restoration or other non-litigation means, wherever possible. Districts should not be expending funds on surveillance as a discrete activity. Rather, surveillance should be performed in conjunction with other field activities such as jurisdictional delineations or other field activities performed in conjunction with permit or enforcement actions.

22. File Maintenance.

- ***Organize files chronologically***
- ***Purge drafts and unnecessary documents***

The administrative record for projects should be organized chronologically once the Corps has made a decision on authorization of

the project. All non-essential items not relative to the decision process (e.g., personal notes, phone messages, old plans, draft documents, and duplicate documents) should be discarded. If keeping outdated plans or project descriptions is necessary, the authorized plans and descriptions should be identified with a stamp that says "Permitted Plans" for easy identification. Files should be purged of unnecessary data/forms/notes to save on storage and to aid in future inquiries that might occur such as a request for modification or a compliance investigation.

23. Reporting.

- ***Report honestly***
- ***All districts are under-funded to meet workload challenges***

Follow the updated QPDS guidelines contained In Appendix III as well as supplemental guidance. When using IPs and NWPs or combinations of NWPs, to authorize a project,

report all permits that were issued and not just one corresponding to one project. For example, for a single and complete project involving both a NWP 13 for several hundred feet of bank protection with a NWP 14 minor road crossing, report both the NWP 13 and 14. When using the same NWP to authorize portions of linear projects, report all NWPs and not just one corresponding to one overall project.